

HOUSE BILL 1011
By Fowlkes

AN ACT to amend Tennessee Code Annotated, Title 29,
Chapter 26; Title 63, Chapter 6 and Title 63,
Chapter 9, relative to expert witness testimony.

WHEREAS, physicians serve as expert witnesses on behalf of both plaintiffs and
defendants in medical liability cases; and

WHEREAS, by providing testimony that is fair and accurate, the expert witness can
contribute to a just outcome and improve the quality of medical care; and

WHEREAS, it is the wish of organized medicine in Tennessee to make explicit its
commitment to knowledgeable and ethical expert witness testimony; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 63, Chapter 6, Part 21 is amended by
adding the following as a new section:

§ 63-6-238.

(a) The board is empowered to develop by rule a model expert witness
affirmation that shall be used by physicians who testify in a medical malpractice case as
referenced in § 29-26-115.

(b) The expert witness guidelines shall include, but not be limited to, the following
recommended qualifications for a physician who acts as an expert witness in a medical
malpractice case:

(1) The physician expert witness shall have a current, valid, and
unrestricted license from Tennessee or a contiguous state to practice medicine in
the state in which such physician practices;

(2) The physician expert witness shall be a diplomate of or have status with a specialty board recognized by the American Board of Medical Specialties, as well as be qualified by experience or demonstrated competence in the subject of the case;

(3) The specialty of the physician expert witness shall be appropriate to the subject matter in the case;

(4) The physician expert witness who provides testimony for a plaintiff or a defendant in a case involving a specific medical procedure or procedures shall hold current privileges to perform those same procedures in a hospital that is accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO);

(5) The physician expert witness shall be familiar with the standard of care provided in the community or similar community at the time of the alleged occurrence and should be actively involved in the clinical practice of the specialty or the subject matter of the case during the time the testimony or opinion is provided;

(6) The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialty or the subject matter of the case; and

(7) The physician expert witness should be prepared to document the percentage of time that is involved in serving as an expert witness. In addition, the physician expert witness should be willing to disclose the amount of fees or compensation obtained for such activities and the total number of times such physician has testified for a plaintiff or defendant.

(c) The expert witness guidelines shall reference a set of recommended standards to be established by the board which shall include, but not be limited to, the following rules for behavior:

(1) Physicians have an obligation to testify in court as expert witnesses when appropriate. Physician expert witnesses are expected to be impartial and should not adopt a position as an advocate or partisan in the legal proceedings.

(2) The physician expert witness should review all the relevant medical information in the case and testify to its content fairly, honestly, and in a balanced manner. In addition, the physician expert witness may be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the physician expert witness should apply the same standards of fairness and honesty.

(3) The physician expert witness should be prepared to distinguish between actual negligence (substandard medical care that results in harm) and an unfortunate medical outcome (recognized complications occurring as a result of medical uncertainty).

(4) The physician expert witness should be familiar with the standards of practice prevailing in the community or a similar community at the time and under the circumstances of the alleged occurrence.

(5) The physician expert witness should be prepared to state the basis of such physician's testimony or opinion and whether it is based on personal experience, specific clinical references, evidence-based guidelines, or a generally accepted opinion in the specialty. The physician expert witness should be prepared to discuss recognized alternate methods and views.

(6) Compensation of the physician expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition and

court appearance. It is unethical for a physician expert witness to link compensation to the outcome of a case.

(7) The physician expert witness is ethically and legally obligated to tell the truth. Transcripts of depositions and courtroom testimony are public records, and subject to independent peer reviews. Moreover, the physician expert witness should willingly provide transcripts and other documents pertaining to the expert testimony to independent peer review if requested by such physician's professional organization. The physician expert witness should be aware that failure to provide truthful testimony exposes the physician expert witness to criminal prosecution for perjury, civil suits for negligence, and revocation or suspension of such physician's professional license.

(d) Once the model expert witness affirmation is developed, the board shall have a copy posted on the department's Web site in a file that can be easily downloaded and copied.

(e) The board has the authority to promulgate public necessity rules in accordance with the provisions of, title 4, chapter 5 to carry out the provisions of this section.

SECTION 2. Tennessee Code Annotated, Title 63, Chapter 9, is amended by adding the following as a new section:

§ 63-9-117.

(a) The board is empowered to develop by rule guidelines that can be used by physicians who testify in a medical malpractice case as referenced in § 29-26-115.

(b) The expert witness guidelines shall include, but not be limited to, the following recommended qualifications for a physician who acts as an expert witness in a medical malpractice case:

(1) The physician expert witness shall have a current, valid, and unrestricted license from Tennessee or a contiguous state to practice medicine in the state in which such physician practices.

(2) The physician expert witness shall have board certification from the American Osteopathic Association as well as be qualified by experience or demonstrated competence in the subject of the case.

(3) The specialty of the physician expert witness shall be appropriate to the subject matter in the case.

(4) The physician expert witness who provides testimony for a plaintiff or a defendant in a case involving a specific medical procedure or procedures shall hold current privileges to perform those same procedures in a hospital that is accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

(5) The physician expert witness shall be familiar with the standard of care provided in the community or similar community at the time of the alleged occurrence and should be actively involved in the clinical practice of the specialty or the subject matter of the case during the time the testimony or opinion is provided.

(6) The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialty or the subject matter of the case.

(7) The physician expert witness should be prepared to document the percentage of time that is involved in serving as an expert witness. In addition, the physician expert witness should be willing to disclose the amount of fees or

compensation obtained for such activities and the total number of times such physician has testified for a plaintiff or defendant.

(c) The expert witness guidelines should reference a set of recommended standards to be established by the board which shall include, but not be limited to, the following rules for behavior:

(1) Physicians have an obligation to testify in court as expert witnesses when appropriate. Physician expert witnesses are expected to be impartial and should not adopt a position as an advocate or partisan in the legal proceedings.

(2) The physician expert witness should review all the relevant medical information in the case and testify to its content fairly, honestly, and in a balanced manner. In addition, the physician expert witness may be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the physician expert witness should apply the same standards of fairness and honesty.

(3) The physician expert witness should be prepared to distinguish between actual negligence (substandard medical care that results in harm) and an unfortunate medical outcome (recognized complications occurring as a result of medical uncertainty).

(4) The physician expert witness should be familiar with the standards of practice prevailing in the community or similar community at the time and under the circumstances of the alleged occurrence.

(5) The physician expert witness should be prepared to state the basis of such physician's testimony or opinion and whether it is based on personal experience, specific clinical references, evidence-based guidelines, or a generally accepted opinion in the specialty. The physician expert witness should be prepared to discuss recognized alternate methods and views.

(6) Compensation of the physician expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition and court appearance. It is unethical for a physician expert witness to link compensation to the outcome of a case.

(7) The physician expert witness is ethically and legally obligated to tell the truth. Transcripts of depositions and courtroom testimony are public records, and subject to independent peer reviews. Moreover, the physician expert witness should willingly provide transcripts and other documents pertaining to the expert testimony to independent peer review if requested by such physician's professional organization. The physician expert witness should be aware that failure to provide truthful testimony exposes the physician expert witness to criminal prosecution for perjury, civil suits for negligence, and revocation or suspension of such physician's professional license.

(d) Once the model expert witness guidelines are developed, the board shall have a copy posted on the department's Web site in a file that can be easily downloaded and copied.

(e) The board has the authority to promulgate public necessity rules in accordance with the provisions of title 4, chapter 5 to carry out the provisions of this section.

SECTION 3. Tennessee Code Annotated, Section 29-26-115, is amended by adding the following as a new, subsection (c) and redesignating the remaining subsections accordingly:

(c) Physicians who testify may sign the expert witness guidelines and give it to the attorney representing the party on whose behalf they intend to testify. During litigation, the document may be used to examine the expert witness and lend credence to or verify the qualifications of those who have signed it. Conversely, expert witnesses

who choose not to sign the affirmation may be cross-examined about their failure to do so.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect July 1, 2005, the public welfare requiring it.